

ORIGINAL

22A336

SUPREME COURT OF THE
UNITED STATES

FILED
OCT 13 2022

OFFICE OF THE CLERK
SUPREME COURT, U.S.

OCT. 12, 2022

CLERK,

The reason for this correspondence to inform the court of an Order and Opinion that was entered on August 1st, 2022 in Criminal Case No. 19-51135 USA v. Hernandez USDC No. 5:17-CR-391-28 by the Fifth Circuit Court of Appeals.

Wherein the courts find me at their presence requesting for extension of time to file my Petition to the Supreme Court. Being that the institution/penitentiary assigned to have remain on lockdown status since August 2nd. In which copies of "Bulletins" issued within the compound to inmates by those authorize warden, assistant warden have been included this motion/letter. And the fee that's required by the Clerk for docketing a case or a petition for a writ of certiorari, are waiting to be withdrawn from inmates account on October 18th where such process for all inmates at this institution have been withheld until said date.

RECEIVED

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

However, based on the information conveyed to the Courts, Petitioner hopes and prays that it takes into consideration such situation/predicament and circumstance that it grants an extension to file a writ of certiorari to the Supreme Court. This will be all for now, thank you for the Courts time and attention.

Respectfully

Ricky Esobedo # 89782380

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

August 1, 2022

Lyle W. Cayce
Clerk

No. 19-51135

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

RICKY ESCOBEDO,

Defendant—Appellant.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:17-CR-391-10

Before SMITH, CLEMENT, and HAYNES, *Circuit Judges.*

J U D G M E N T

This cause was considered on the record on appeal and the briefs on file.

IT IS ORDERED and ADJUDGED that the judgment of the District Court is AFFIRMED.

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

August 1, 2022

Lyle W. Cayce
Clerk

No. 19-51135

UNITED STATES OF AMERICA,

Plaintiff—Appellee,

versus

ROBERT EUGENE HERNANDEZ; RICKY ESCOBEDO,

Defendants—Appellants.

Appeal from the United States District Court
for the Western District of Texas
USDC No. 5:17-CR-391-28

Before SMITH, CLEMENT, and HAYNES, *Circuit Judges.*

PER CURIAM:*

A jury convicted Robert Eugene Hernandez and Ricky Escobedo of several charges related to their involvement in the Texas Mexican Mafia (“TMM”). Hernandez now appeals his sentence of 420 months in prison, and Escobedo appeals his convictions and his sentence of 300 months in prison. For the following reasons, we AFFIRM.

* Pursuant to 5TH CIRCUIT RULE 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIRCUIT RULE 47.5.4.

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I. Background

Hernandez and Escobedo were members of the TMM and were involved in the group's drug distribution and racketeering activities. The TMM requires a tax, known as "the dime," from nonmembers who distribute narcotics in defined territories. Hernández and Escobedo were involved in the collection of dime payments and participated in home invasions designed to elicit compliance with the TMM's tax mandate.

Hernandez and Escobedo were both convicted of (1) conspiracy to interfere with commerce by threats or violence (Count One); (2) conspiracy to possess with intent to distribute 500 grams or more of methamphetamine, cocaine, and heroin (Count Two); (3) possession of a firearm in furtherance of drug trafficking (Count Twelve, Escobedo; Count Eighteen, Hernandez); (4) felon in possession of a firearm (Count Thirteen, Escobedo; Count Twenty, Hernandez); and (5) conspiracy to possess firearms in furtherance of drug trafficking (Count Twenty-One). Hernandez was also convicted of possession with intent to distribute methamphetamine (Count Nineteen); and Escobedo was convicted of possession with intent to distribute cocaine (Count Eleven).

We have jurisdiction over Hernandez and Escobedo's timely appeals under 18 U.S.C. § 3742 and 28 U.S.C. § 1291.

II. Discussion

a. Hernandez

Hernandez argues that his sentence is substantively unreasonable because it is greater than necessary to achieve the sentencing goals of 18 U.S.C. § 3553(a). Specifically, he argues that the district court should have given more consideration to his mitigating factors, including his advanced age and rehabilitative needs as a combat veteran.

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We consider the substantive reasonableness of a sentence imposed under an abuse-of-discretion standard. *Gall v. United States*, 552 U.S. 38, 51 (2007). Furthermore, we presume that a sentence below the properly calculated guidelines range, like Hernandez's, is reasonable. *United States v. Simpson*, 796 F.3d 548, 557 (5th Cir. 2015).

The district court considered Hernandez's mitigation arguments, the record, and the § 3553(a) factors before determining that a total sentence below the guidelines range of life was fair and reasonable. Hernandez fails to rebut the presumption of reasonableness attached to his sentence by showing that the district court failed to consider a pertinent factor or erred in balancing the sentencing factors. *See id.* at 557–58. Accordingly, the district court did not abuse its discretion by imposing Hernandez's sentence.

b. Escobedo

Escobedo argues that the district court violated his Fifth Amendment rights when it adopted the Government's jury instructions. Per Escobedo, the jury instructions constructively amended the indictment by broadening the counts contained therein, thus allowing the jury to convict him of unindicted crimes. Specifically, Escobedo asserts that the district court constructively amended Counts One, Eleven, and Twelve because the jury instructions omitted any reference to the date ranges included in the indictment, as well as any reference to the overt acts cited in Count One or the specific gun cited in Count Eleven. Because Escobedo did not object to the jury instructions at trial, we review for plain error only. *See United States v. Bohuchot*, 625 F.3d 892, 897 (5th Cir. 2010).

“A criminal defendant has a Fifth Amendment right to be tried only on charges presented in a grand jury indictment, and therefore only the grand jury may amend an indictment once it has been issued.” *United States v. Daniels*, 252 F.3d 411, 413 (5th Cir. 2001) (internal quotation marks and

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citation omitted). A constructive amendment of an indictment occurs “when the [G]overnment is allowed to prove an essential element of the crime on an alternative basis permitted by the statute but not charged in the indictment.” *United States v. Diaz*, 941 F.3d 729, 736 (5th Cir. 2019) (per curiam) (quotation omitted).

We presume that a jury has followed the instructions given by the district court. *United States v. Olano*, 507 U.S. 725, 740–41 (1993); *United States v. Isgar*, 739 F.3d 829, 841 n.39 (5th Cir. 2014); see also *United States v. Brown*, 616 F.2d 844, 846–48 (5th Cir. 1980) (holding no plain error where the district court instructed jury that the Government was required to prove that defendant committed the financial crime “as charged” in the indictment). Here, the written jury charge expressly noted that even though the indictment alleged that “the offenses were committed on or about a specified date or date range,” the Government did not have to prove that the offense was “committed on that exact date” as long as it proved “beyond a reasonable doubt that the defendant committed the crime on a date reasonably near the date stated in the indictment.” The jury charge further instructed that Escobedo was “not on trial for any act, conduct, or offense not alleged in the indictment.” Moreover, prior to reading the charges to the jury, the district court confirmed that each juror had a copy of the indictment readily available. Presuming, as we are required to do, that the jury followed its instructions, it could not have convicted Escobedo of anything other than the offenses “as charged” in the indictment. See *Olano*, 507 U.S. at 740–41; *Brown*, 616 F.2d at 846–48.

Additionally, despite Escobedo’s focus on the limited testimony detailing activities occurring outside the timeframe specified in the indictment, the Government presented ample evidence by which the jury could convict Escobedo on Counts One and Eleven. Similarly, the Government presented sufficient evidence by which the jury could convict

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Escobedo on Count Twelve. Escobedo has not demonstrated that his substantial rights were affected simply because the jury heard evidence regarding some criminal activity that occurred in 2007 and evidence of other firearms (particularly given that the other firearms evidence was relevant to Count Twenty-One). Accordingly, Escobedo cannot demonstrate that the district court committed plain error. *See Bohuchot*, 625 F.3d at 897, 900.

Escobedo also argues that his consecutive sentences for Count Twelve and Count Twenty-One and his concurrent sentences for Count Two and Count Eleven were multiplicitous, thus violating the Double Jeopardy Clause. Under the test articulated in *Blockburger v. United States*, 284 U.S. 299 (1932), “double jeopardy is not implicated if each offense at issue involves proof of at least one element not required of the other.” *United States v. Palella*, 846 F.2d 977, 982 (5th Cir. 1988). Escobedo acknowledges that the *Blockburger* test would foreclose his double jeopardy argument under normal circumstances but asserts that the alleged constructive amendments effectively removed any “differences between the counts.” Because, as discussed above, Escobedo’s constructive amendment argument fails, his double jeopardy claim also fails.¹

The judgment of the district court is AFFIRMED.

¹ In any event, this claim is meritless. Count Twelve involves a violation of 18 U.S.C. § 924(c), which requires proof of possession of a firearm in furtherance of drug trafficking, and Count Twenty-One involves a violation of § 924(o), which requires proof of conspiracy to possess a firearm in furtherance of drug trafficking. Similarly, Count Eleven involves a violation of 21 U.S.C. § 841(a)(1), (b)(1)(C), which requires proof of possession with intent to distribute, and Count Two involves a violation of §§ 846 and 841(a)(1), (b)(1)(A), which requires proof of conspiracy to possess with intent to distribute. In other words, each of these offenses involves “proof of at least one element not required of the other.” *See Palella*, 846 F.2d at 982.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

August 01, 2022

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing
or Rehearing En Banc

No. 19-51135 USA v. Hernandez
USDC No. 5:17-CR-391-28

Enclosed is a copy of the court's decision. The court has entered judgment under **FED. R. APP. P. 36**. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

FED. R. APP. P. 39 through **41**, and **5TH CIR. R. 35, 39, and 41** govern costs, rehearings, and mandates. **5TH CIR. R. 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following **FED. R. APP. P. 40** and **5TH CIR. R. 35** for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

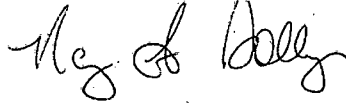
Direct Criminal Appeals. **5TH CIR. R. 41** provides that a motion for a stay of mandate under **FED. R. APP. P. 41** will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under **FED. R. APP. P. 41**. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari.** Additionally, you **MUST** confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

Sincerely,

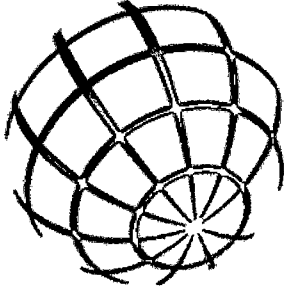
LYLE W. CAYCE, Clerk

A handwritten signature in cursive script, appearing to read "Nancy F. Dolly".

By: Nancy F. Dolly, Deputy Clerk

Enclosure(s)

Mr. Richard Louis Durbin Jr.
Mr. Joseph H. Gay Jr.
Ms. Kimberly S. Keller
Mr. Shannon Willis Locke
Mr. Mark Randolph Stelmach



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August 15, 2022

Mr. Ricky Escobedo
No. 89282-380
USP Pollock
U.S. Penitentiary
P.O. Box 2099
Pollock, Louisiana 71467

Re: United States of America v. Escobedo USCA Case No. 19 - 51135

Dear Mr. Escobedo:

A recent review of direct appeal decisions in the Fifth U.S. Circuit Court of Appeals has shown a dispositive Order and Opinion entered in your case on August 1, 2022. As a courtesy we have enclosed a copy for your review.

If you are considering further post-conviction relief efforts and we may offer assistance from one of our attorneys and paralegals, please complete and return the enclosed Case Summary Questionnaire for a NO COST initial review. We attempt to provide the initial analysis within 10-14 days of receipt of your Form.

Last, we appreciate the opportunity to provide you with the benefits of our many years of experience and well established record of successes. We suggest that if possible, you have family or friends visit our website (above) (Spanish version also available), to better understand the scope of our many services and successes.

Respect & Regards,

Case Analyst @ LPS, LLC

USP Pollock INMATE BULLETIN

The purpose of this bulletin is to provide an update regarding institution operations. Our goal is to progress the institution to the least restrictive security measures necessary. However, this process will take some time and include additional searches and interviews. Your cooperation in this activity will be required, to ensure the safest environment possible. Here are a few expectations:

- Any time you are removed from your cell, everyone in the cell will continue to be restrained.
- Prior to being removed from your cell or receiving items through the food slot, you will be required to remove any items covering your windows (door and back of the cell). Staff may request you to turn on your cell lights if they cannot observe all areas of the cell. You should not cover your window at any time; however, services may be withheld until staff can safely deliver them.
- Inappropriate pictures should not be on your walls, air vents should not be covered, and lights should not be covered.
- Commissary sales of OTC medication, stamps and hygiene items will continue. Normal commissary sales will not resume until unit activity progresses toward normal operations and USP inmate workers can safely return to duty.

//s//

8/5/2022

C. Rivers, Acting Warden

Date

MEMORANDUM FOR INMATE POPULATION

FROM: ~~S. Ma'at, Acting Complex Warden,
FCC Pollock~~

SUBJECT: Inmate Expectations

As the Acting Complex Warden of this facility, I am committed to providing a safe, secure, and orderly environment for staff, inmates, and visitors. My experience has taught me that effectively managing inmate behavior is critical to achieving this goal. I believe most inmates want to live in an institution where they can work and program without having to worry about being victimized or having their daily activities disrupted.

Unfortunately, there are some inmates who continue to engage in behavior which negatively impacts everyone. Consequently, violent and aggressive behavior will not be tolerated. I expect all inmates to comply with institution rules, maintain high levels of sanitation within their living areas, treat staff respectfully, and interact positively with each other.

In order to ensure everyone clearly understands my requirements, attached is a list of expectations which will be enforced without question. Many of these expectations are drawn from the prohibited acts of which you were given notice when you entered this facility. Please read and familiarize yourself with these regulations. Your compliance with each of them is mandatory and there will be zero tolerance for anything less.

1. Inmates shall not be in possession of any weapons or weapon-making materials.
2. Inmate cells should be clean with no excess property. No coverings, pictures, calendars, etc., may be placed on the lockers, vents, walls, lights, cell door window, or outside window at any time.
3. Candles or any type of open flame are prohibited.
4. Inmates will submit to searches at any time requested.
5. Inmates and staff should not communicate with each other in a disrespectful manner.
6. Cells will be cleaned daily and beds must be made Monday through Friday by 7:30 a.m., and must always be inspection ready.

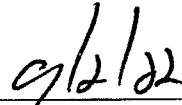
USP Pollock INMATE BULLETIN

We are steadily working toward less restrictive security measures while maintaining a safe and secure environment for staff and inmates. To keep the population informed, I have outlined the plan as we progress forward:

- Hot meals will be provided for the breakfast and lunch meals. We will progress to a hot dinner meal on Wednesday, September 7, 2022, absent any unforeseen circumstances.
- Showers will continue to occur every Monday, Wednesday and Friday.
- Commissary will continue to process orders from the enhanced list.
- Laundry will continue to operate on the regular schedule.
- Cleaning supplies will continue to be issued to ensure sanitation is maintained at the highest level.
- You are expected to discard trash from your cell following every meal.
- Once it has been determined appropriate, we will progress to dayroom programming in designated cohorts. This process will be fluid and dependent on the behavior of the inmate population.



J.W Cox, Acting Complex Warden



Date



USP POLLOCK INMATE BULLETIN

Notice of Encumbrance/Limitations

Pursuant to Program Statement 4500.12, Trust Fund Deposit Fund Manual, the Warden may exercise discretion to encumber funds and limit services for inmates charged with prohibited acts, such as but not limited to, refusing programs, weapons, intoxicants, narcotics, sexual acts, and cellular telephones. Encumbrances and limitations may consist of the following: disallow Telephone Fund Transfers (TRUFONE), disallow TRU-Units Transfer (TRULINCS), disallow access to Manage Funds (TRULINCS), limited Commissary shopping list, and encumber monetary account. Funds the Warden encumbers may only be released upon his/her approval or upon inmate release. This notice will go into effect immediately.

Aviso de Impedimento/Limitaciones

De conformidad con la Declaracion del Programa 4500.12, Fondo Fiduciario Manual del Fondo de Deposito, he ejercido mi discrecion papa impedir sus fondos y limitar sus servicios; para aquellos reclusos encontrados culpables de actos prohibidos como y entre otros, rechazar programas, armas, estupedfacientes, narcoticos y telefonos celulares. Los impedimentos y limitaciones pueden consistir en lo siguiente: no permitir transferencias de fondos telefonicas (TRUFONE), no permitir TRU-Units Transfer (TRULINCS), no permitir el acceso a Manage Funds (TRULINCS), limitar la lista de compras de la comisaria e impedir la cuenta monetaria. Los fondos que el Guardian impedira solo pueden ser liberados con su aprobacion o con la liberacion del recluso. Este aviso entrara inmediatamente.

J. W. Cox, Acting Complex Warden

Date



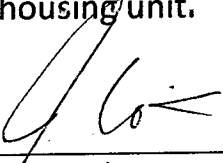
USP POLLOCK INMATE BULLETIN

TELEPHONE PRIVILEGES

Effective immediately, inmates at the USP will begin to have use of the telephone in their cells. Telephones will be provided Monday through Friday, from 6:00 a.m. until 9:00 p.m. Telephones will not be used during official counts; 10:00 a.m. and 4:00 p.m. A phone will be placed in the cell, through the food slot, for the inmates in the cell to use. Each inmate will be granted one (1) 15-minute telephone call per week. You will be given three (3) opportunities to place the call. The phone will then be taken to the next cell. This procedure will continue until each inmate has been afforded the opportunity to use the telephone each week.

We will begin this process at a different cell each week to give each inmate the opportunity to communicate with friends and family at different times of the day.

Inmates that work during the day, will be afforded the same opportunity for one (1)- 15 minutes telephone call per week, after their working hours via the telephones on the wall of the housing unit.



J. W. Cox, Acting Complex Warden



Date



FCC POLLOCK INMATE BULLETIN

Access to Educational Materials

This is a reminder that the Education Department offers in-cell programming during periods when movement to the Education Department is restricted. If you would like to participate in an in-cell program, you must submit a hand-written cop-out to the Education Department. Place your cop-out in the in-house mail or hand to Education Staff during their weekly rounds. Education does rounds in SHU, typically, on Thursdays.

These cop-outs should be addressed to the "Education Department" and request "In-Cell Programming." After you complete an in-cell program, you must submit a new cop-out to the Education Department that requests additional in-cell programming.

If you have any questions for the Education Department, you must submit a hand-written cop-out through the in-house mail or hand to Education Staff during their weekly rounds.

USP Education Department



FCC POLLOCK

INMATE BULLETIN

Attention: Inmates requesting access to the law library

Due to modified operations, the law library will be open and available for use as follows:

The Education Department will prioritize law library access (to include copier usage) to inmates with an imminent court deadline. If you have an imminent court deadline, submit a copout to Education staff during weekly rounds and include your deadline date, case number, and name of court. After you request law library access, the institution's Legal Department will verify the imminent court deadline prior to granting access. Those inmates without an imminent court deadline may also submit a copout to Education staff during weekly rounds. Education will accommodate these inmates a first-come-first-serve basis after priority inmates.

The Supervisor of Education and Unit Team will coordinate access dates and times. Whether you have an imminent court deadline or not, access will be in one-hour sessions.

If you have questions, please send an "inmate request to staff" to the Education Department

USP Education Department